Antioch Building Materials Co. *and* Operating Engineers Local Union No. 3, International Brotherhood of Operating Engineers, AFL–CIO. Case 32–CA–13804

February 25, 1997

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND FOX

On March 9, 1995, the National Labor Relations Board issued a Decision and Order[1] in this proceeding finding that the Respondent unlawfully repudiated its obligation under the collective-bargaining agreement to arbitrate grievances, and further unlawfully repudiated its December 1993 verbal agreement with the Union to arbitrate outstanding and unresolved grievances initiated by the Union against the Respondent during the term of the collective-bargaining agreement. The Board ordered the Respondent, inter alia, to comply with a renewed request by the Union to arbitrate the aforementioned grievances.

Thereafter, the Board was administratively advised by the General Counsel that, during compliance discussions, the Respondent indicated its willingness to proceed to arbitration on all unresolved written grievances initiated by the Union, but refused to arbitrate oral grievances on two grounds: (1) the Board's Order does not specifically mention oral grievances; and (2) the collective-bargaining agreement makes it clear that arbitration is not available unless the grievance has been timely brought to the parties' attention in writing. The Union indicated its contrasting view that the Board's Decision and Order in this proceeding required arbitration with respect to all outstanding and unresolved grievances, including the oral grievances noted in the judge's decision.

Accordingly, on July 2, 1996, the Board issued a Notice to Show Cause why the Board should not clarify the Order in this proceeding specifically to include or exclude a requirement to arbitrate oral grievances. The Respondent, the General Counsel, and the Union each filed a response to the Notice to Show Cause.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

We have carefully considered the positions of the parties in light of the record in this case and have decided to clarify the Order in this proceeding specifically to include a requirement that the Respondent, upon request, arbitrate oral grievances.

The General Counsel presented evidence at the hearing that the Union initiated both oral and written grievances during the term of the collective-bargaining agreement. The judge specifically credited the uncontradicted testimony that certain oral grievances had been initiated. The judge did not exclude these oral grievances in finding that the Respondent had violated Section 8(a)(5) and (1) of the Act by repudiating its contractual obligation and additional verbal agreement to arbitrate grievances. Nor did the judge in any way limit his remedy solely to written grievances. Rather, the judge recommended that the Respondent be ordered, without any limitation, to arbitrate the "outstanding and unresolved grievances" initiated by the Union against the Respondent during the term of the collective-bargaining agreement. Thus, although the judge's recommended Order did not contain a specific reference to oral grievances, the most reasonable construction of his decision, when considered as a whole, is that he intended the oral grievances to be arbitrated as well as the written ones.

The Respondent filed exceptions with the Board to the decision of the administrative law judge. In its exceptions, however, the Respondent did not raise any contention with respect to oral grievances. The Respondent argued in its exceptions only that the unfair labor practice charge was barred by the statute of limitations set forth in Section 10(b) of the Act. Indeed, the Respondent submitted that "[h]ad the charge been filed within the 10(b) period from decertification, this Respondent would concede that it had a duty to arbitrate with the Union[,]" without drawing any distinction between oral and written grievances.[2]

As stated above, on March 9, 1995, the Board, with only minor modifications, affirmed the judge's decision and adopted his recommended Order. Like the judge, the Board ordered the Respondent to take the following affirmative action:

> Comply with a renewed request by Local Union No. 3 to arbitrate the outstanding and unresolved grievances initiated by Local Union No. 3 against the Respondent during the term of the aforesaid master agreement.

At the time of its decision, the Board's intention was to require the Respondent to proceed to arbitration on both oral and written grievances. Today, in order to eliminate any possible ambiguity, we shall clarify the Board's Order to specifically include a requirement to arbitrate oral grievances. We reject the Respondent's claim that the collective-bargaining agreement privileges its refusal to arbitrate oral grievances for the following reasons.

[1] 316 NLRB 647.

[2] The Board adopted the judge's rejection of the Respondent's argument based on Sec. 10(b). The judge found that the Union, following agreement by the Respondent to proceed to arbitration and subsequent ongoing discussions with the Respondent to arrange for arbitration and select an arbitral panel, timely filed its unfair labor practice charge 2 days after the Respondent reneged and refused to proceed to arbitration.

First, we find that the Respondent failed to raise its contention in a timely manner. Thus, the record shows that at the hearing the Respondent did not object to the introduction of evidence of oral grievances or argue in its brief to the judge that it had no legal obligation to arbitrate oral grievances. It is well established that the failure to raise an issue in a timely fashion before the judge operates as a waiver of that argument. *International Paper Co.*, 319 NLRB 1253, 1276 (1995); *Auto Workers Local 594 v. NLRB*, 776 F.2d 1310, 1314 (6th Cir. 1985), enfg. 272 NLRB 705 (1984). In addition, as set forth above, although the Respondent filed exceptions to the judge's decision, it failed to present any argument concerning the oral grievances discussed by the judge. Section 102.46 of the Board's Rules and Regulations provides in pertinent part as follows:

> (b)(2) Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived. . . .
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> . . . .
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> (g) No matter not included in exceptions or cross-exceptions may thereafter be urged before the Board, or in any further proceeding.

Accordingly, we find that the contention raised by the Respondent at the compliance stage of this proceeding that it is not obligated to arbitrate oral grievances has been waived inasmuch as it was not previously presented to the judge or the Board. See *Giant Food Stores*, 298 NLRB 410 (1990).

Second, assuming arguendo that the Respondent's argument is properly before us and assuming further that the Respondent is correct that the contract limits arbitration to written grievances, the Respondent is still obligated to arbitrate the oral grievances based on the judge's finding that in December 1993 the parties' attorneys entered into a separate agreement to arbitrate the outstanding and unresolved grievances. See 316 NLRB at 650, 653. There is nothing in the record indicating that the December 1993 agreement was limited to the arbitration of written grievances. Therefore, the Respondent's defense, based as it is on the language of the parties' collective-bargaining agreement, would not apply to the Respondent's arbitration obligations under the separate December 1993 agreement.

Finally, again assuming arguendo that the Respondent's defense has been timely raised to the Board, we would in any event find, in agreement with the position of the General Counsel and the Union, that the arbitrator is best suited to resolve the question whether the disputes here—over clearly arbitrable subject matters—are still subject to arbitration even when initiated in the form of oral, rather than written, grievances. In its statement of position, the Union maintains that, notwithstanding contract language that grievances be in writing, past practice under the agreement has been to allow the Union to raise and arbitrate oral grievances. An arbitration proceeding is the proper forum for resolving whether the past practice evidence supports the Union's position on this essentially procedural issue. As the Supreme Court stated in *John Wiley & Sons v. Livingston*, 376 U.S. 543, 557 (1964), "Once it is determined, as we have, that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator." This distinction between substantive issues of arbitrability, to be decided by judicial tribunals, and procedural issues, which may be decided by arbitrators, has not been disturbed by the Supreme Court's subsequent decision in *AT & T Technologies v. Communications Workers*, 475 U.S. 643 (1986). See, e.g., *Toyota of Berkeley v. Food & Commercial Workers Local 1095*, 834 F.2d 751, 754 (9th Cir. 1987).

Therefore, for all these reasons, we hold that the Respondent is obligated to arbitrate all outstanding grievances, including oral grievances, and we shall modify our Order accordingly.

ORDER

The National Labor Relations Board orders that the Respondent, Antioch Building Materials Co., Pittsburg, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order in *Antioch Building Materials Co.*, 316 NLRB 647 (1995), as modified below.

Substitute the following for paragraph 2(a) of the Board's Order.

"(a) Comply with a renewed request by Local Union No. 3 to arbitrate the outstanding and unresolved grievances, including oral grievances, initiated by Local Union No. 3 against the Respondent during the term of the aforesaid master agreement."

CHAIRMAN GOULD, concurring.

I concur and write specially with the following additional observations. The Supreme Court in *AT & T Technologies v. Communications Workers*, 475 U.S. 643 (1986), held for a unanimous court that where one party resists arbitration and the matter is litigated in the courts, the question of arbitrability is for the court and not the arbitrator. It is true that much of the reasoning of the Court suggests that this holding would apply to a situation where the issue of arbitrability has not been litigated in the courts, but rather is simply submitted to the arbitrator. See Gould, *Judicial Review of Labor Arbitration Awards—Thirty Years of the Steelworkers Trilogy: The Aftermath of AT & T and Misco*, 64 Notre Dame L. Rev. 464, 479–486 (1989). However, the issue was not directly confronted and I believe that the Court of Appeals for the Third Circuit

correctly concluded that "[b]ecause an arbitrator's jurisdiction is rooted in the agreement of the parties, they may agree to submit even the question of arbitrability to an arbitrator." *Johnson v. Food & Commercial Workers Local 23*, 828 F.2d 961, 964 (3d Cir. 1987). The Third Circuit's view is compatible with Justice White's opinion in *AT & T* to the effect that the parties may indeed submit the issue of arbitrability to the arbitrator. Accord: *E.M. Diagnostic Systems v. Teamsters Local 169*, 812 F.2d 91 (3d Cir. 1987); *Franklin Electric Co. v. Auto Workers Local 1000 (UAW)*, 886 F.2d 188, 192 (8th Cir. 1989); *Bokunewicz v. Purolater Products*, 907 F.2d 1396, 1399 (3d Cir. 1990); *United Industrial Workers (Local #16) v. Government of the Virgin Islands*, 987 F.2d 162 (3d Cir. 1993) at 167–168. Accordingly, under the circumstances presented here and given the dictates of Federal labor law policy reflected in arbitration and litigation, I am of the view that the matter is appropriately submitted to the arbitrator for resolution rather than to the National Labor Relations Board.